SUPREME COURT U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1960

No. 88

TERMINAL CONSTRUCTION CO., INC. and
FROUGE CONSTRUCTION CO., INC.,

Petitioners,

—against—

METRO INDUSTRIAL PAINTING CORP. and MAX GERBEN, JOAN GERBEN and LEO GERBEN, doing business as GERBEN CONTRACTING COMPANY,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID MORGULAS
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Citations to Opinions Below

The opinion of the United States District Court for the Southern District of New York (Dawson, J.) is reported at 181 Fed. Supp. 130 and is printed in the Record to be found in the Appendix of the Petition herein at pgs. 35a-42a. The opinion of the Court of Appeals for the Second Circuit is reported at 287 F. 2d 382 and is printed in the Appendix to the Petition herein at pgs. 25-35.

Jurisdiction

The jurisdiction of this Court has been invoked by Petitioners under 28 USC Sec. 1254(1). The judgment of the Court of Appeals for the Second Circuit was entered on February 16, 1961.

Statement of the Case

This petition arises out of the following facts: Sometime prior to May 26, 1958, Terminal Construction Co., Inc., a New Jersey corporation, and Frouge Construction Co., Inc., a Connecticut corporation, both then doing business as a Joint Venture are hereafter referred to as Terminal-Frouge, entered into an agreement with the United States of America for the construction of a Capehart Act Military housing project at the Homestead Air Force Base, located at Homestead, Florida. On May 26, 1958, Metro Industrial Painting Corp., a New York Corporation, and Gerben Contracting Company, a partnership consisting entirely of New York State citizens also acting as a Joint Venture (and hereafter referred to as Metro) entered into a subcontract with Terminal-Frouge for certain painting work to be done at the aforementioned Capehart project. For convenience the Metro-Gerben Joint Venture will hereinafter be referred to as Metro. This subcontract was executed by all parties in the office of counsel for Terminal-Frouge in New York City, New York. The subcontract contained the following arbitration provisions:

> "Anything to the contrary notwithstanding in this agreement it is understood that any questions

with respect to performance, non-performance, default, compliance, or non-compliance, whether on behalf of the Contractor or the Subcontractor, shall be determined by Sidney O. Raphael and David Morgulas jointly. In the event that the said Sidney O. Raphael and David Morgulas cannot agree as to the aforegoing matters, then and in that event request shall be made of the President of the Bar Association of the City of New York for appointment and or designation of a third party, who shall then act as sole arbitrator to determine all such matters as to which the said Sidney O. Raphael and David Morgulas cannot agree, and the decision of said third party shall be final and conclusive. This provision shall be deemed to supplant and or modify any provision of this agreement whether printed or typewritten, which shall in any manner be inconsistent therewith.

"Pending the adjustment of any disputes or differences and the determination thereof either by adjustment or award or otherwise, the job program shall not be delayed, but all work shall continue pending the determination of such dispute as aforementioned."

During the performance of the contract, a number of disputes arose with respect to non-performance, default and failure to comply with contract terms, schedules and specifications. One of the principal matters in dispute was the alleged failure of Terminal-Frouge to have the required number of dwelling units (as provided for by the subcontract) prepared in advance for Metro's painting work so that such work might proceed according to schedule and economically.

all of which caused Metro to incur extremely high additional costs. Other disputes related to (a) failure of Terminal-Frouge to abide by contract specifications in that they required work which was clearly not called for under the subcontract, (b) to Terminal-Frouge's failure to provide properly prepared surfaces to receive Metro's painting work, (c) to Terminal-Frouge's failure to properly erect certain walls thereby necessitating considerable repainting, and to numerous other matters of this general sort. These claims aggregate the sum of $283,000.00. Furthermore, an unpaid balance in the sum of $13,819.71 on the original contract price is also claimed. Despite repeated demands, Terminal-Frouge refused to arbitrate these disputes and Metro was forced to seek redress pursuant to 9 U.S.C. Section 4. By cross-motion, Terminal Frouge moved to stay the arbitration requested by Metro on the sole ground that the issues referred to in the moving petition were not arbitrable; their contentions as to the lack of a transaction involving "Commerce" within the meaning of 9 U.S.C. Section 1, and lack of diversity jurisdiction under 28 U.S.C. Section 1332(c) were first made on oral argument and appear nowhere in the moving papers nor in their answer to the petition.

The District Court for the Southern District of New York, by Judge Dawson, granted Metro's motion to compel arbitration, holding that the subcontract was clearly a "contract evidencing a transaction involving commerce" within the meaning of the United States Arbitration Act, 9 U.S.C. §4, and that there was nothing to indicate that the specific issues in dispute did not fall within the broad penumbra of the subject arbitration clause, particularly when viewed

according to the policy of liberal interpretation dictated by the United States Arbitration Act. The cross-motion of Terminal-Frouge was denied on the ground that Metro had more than met the burden of proving that Petitioner Frouge's principal place of business was in Connecticut, not New York, within the meaning of 28 U.S. Code, Section 1332 (c), and that Terminal-Frouge had failed to prove that Frouge's principal place of business was actually in New York so as to oust the Court of diversity jurisdiction.

The Second Circuit Court of Appeals (at 287 F. 2d 382) affirmed The District Court on each and every point, finding on the facts presented that (1) The subcontract evidenced a "transaction involving interstate commerce", (2) that, Frouge's principal place of business was in Bridgeport, Connecticut and not in New York and (3) that the arbitration clause in the contract between Metro, on one hand, and Frouge-Terminal on the other clearly comprehended arbitration as to the matters in dispute regardless of whether Federal or New York law was applied. The Court also pointed out that inasmuch as New York considers questions of the scope of arbitration clauses as questions of procedural law, there could be no reference to the law of Florida on any point.

Questions Presented

Petitioners would have it appear that important and broad questions of law are presented by the decision of the Court below. Such a claim on Petitioners' part is, naturally, obligatory since otherwise there would not have been even a pretense for the filing of the petition. The facts of the instant case, however,

render it *sui generis* as to the actual issues involved. The issues which petitioners cite as the "Questions Presented" are not present at all in the instant case, however deftly petitioners may attempt to infer that they are.

In setting forth their "Questions Presented" on page two of the petition herein, Petitioners attempt to create the impression that the District and Circuit courts reached their conclusions herein by rejecting applicable State substantive law in favor of a newly defined Federal "substantive" law. This inference is wholly without foundation.

Petitioners then go on to state at page 7 of the petition that the questions decided here were the same as those involved in *Robert Lawrence Company Inc.* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402. This contention is equally without merit, as will be presently shown.

Under point 4 of their "Questions Presented" petitioners raise yet another spurious issue, i.e., whether the U.S. Arbitration Act applies in actions brought in state courts as well as those brought in the Federal Courts. This question was totally absent from the present proceedings. As the instant case was brought initially in the Federal Courts and decided in the Federal Courts, it was wholly irrelevant whether or not the Arbitration Act might be held, in some other situation, to apply in a state court proceeding. The question may some day arise, but it has not arisen in the instant case. In stating this "Question" petitioners have wholly and improperly departed from the actual issues of this case, considered and decided by both Courts below.

What the court below actually held in our case was that 1) the sub-contract evidenced a "transaction involving interstate commerce" within the meaning of 9 U.S.C. 4 (The United States Arbitration Act), 2) that the disputes here involved were within the scope of the arbitration clause contained in the sub-contract and 3) that Petitioners' various attacks on the Court's jurisdiction were wholly without factual basis as Frouge's principal place of business was in Connecticut and not New York.

What Petitioners have attempted to do is to extend the Court's holding with regard to the scope of the subject arbitration clause into a whole-scale restatement of the principles set forth in *Robert Lawrence* v. *Devonshire Fabrics Inc.*, (supra). But the holding in the instant case does not in any way depend on the *Lawrence* case. On the contrary, the "liberal" policy of interpretation of arbitration clauses is a Federal doctrine which goes back as far as *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U.S. 449, 453 (1934), and was merely restated by, not originated in *Lawrence* and then only at the end of a long and many faceted decision which dealt with substantive questions which are not present at all in the instant case.

Finally, the question raised by Petitioners under Item 5 of its "Questions Presented" never was raised at all during the course of these proceedings. Petitioners attempted below to argue that the principal place of business of Petitioner Frouge was in New York City on the grounds that certain so-called "executive offices" were located within the city. Metro however conclusively proved that Frouge's main ex-

ecutive offices as well as its operational offices are in fact located in Bridgeport, Connecticut, and both the District and the Circuit Courts so found. The matter was decided solely on the basis of the facts presented rather than on any choice between applicable "tests." Addressing itself to this point, the Circuit Court said:

> "We find sufficient evidence, however, to support the finding below that petitioners met their burden of establishing that Frouge's principal place of business was Connecticut and not New York. The affidavits filed by the parties established, *inter alia,* that Frouge owned a two-story building in Connecticut; that clerical, bookkeeping and administrative work was done in Connecticut; and that *Frouge's own letterhead referred to the Connecticut building as its 'main office.'* " (emphasis added)

With great deference, we respectfully submit that the issue with regard to the principal place of business of Petitioner Frouge was an issue of fact, pure and simple, and is not a subject for review by this Court.

REASONS FOR DENYING APPLICATION FOR WRIT

POINT ONE

The holding in the instant case does not depend on the decision of the 2d Circuit Court of Appeals in *Robert Lawrence* v. *Devonshire Fabrics Inc.*, 271 F2d 402.

Petitioner has attempted to make it appear as though, to use his own words, the "questions presented" in *Lawrence* (supra) are "virtually identical with those presented on this petition" (see p. 7 of the Petition herein), and has thereafter proceeded to frame all of its arguments in terms of the questions which arose under the *Lawrence* case.

Nothing, in fact, could be farther from reality since the holdings in the instant case in no way depend on the holding in *Lawrence*.

The pivotal issue in *Lawrence* was whether or not a claim of fraud in the inducement of the contract containing the arbitration clause was to be passed upon by arbitrators convened under that clause or by the Courts, prior to any arbitration proceedings. Serious questions involving the substantive law of contracts of the State of New York were thus raised. No such questions are present in the instant case.

The only element of *Lawrence* which is even remotely involved here is its restatement of the long accepted principle that a Federal court will liberally

construe an arbitration clause which is properly before it pursuant to the U.S. Arbitration Act. This principle is hardly unique or newly enunciated in the *Lawrence* case. See, e.g., *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, (supra); *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F.2d 978; *Signal-Stat Corp.* v. *Local 475*, 235 F.2d 298, cert. denied 354 U.S. 911; see also *Wabash Ry.* v. *American Refrigerator Transit Co.*, 7 F.2d 335, 351, cert. denied 270 U.S. 643. This doctrine has, in fact, even been adopted by the New York Court of Appeals, with specific reference to its restatement in *Lawrence*. See *Matter of Grayson-Robinson Stores, Inc.*, 8, N.Y. 2d 133.

In *Lawrence*, the Court held that State law must give way to Federal law on the *substantive* issue of whether the contract containing the arbitration clause is itself valid and enforceable. Under the law of New York this "threshold issue", as it has been called, is a question for the Courts, rather than for the arbitrators and where the Court has found that the contract itself is invalid the disputes can never reach the arbitrators at all. Applying its conception of Federal law, the court in *Lawrence* held that this "threshhold" issue was for the arbitrators, not the court.

But in the instant case there is no question whatever as to the validity of the sub-contract, which is conceded to be valid by Petitioners. Thus the question of "choice of laws," to use Petitioners' phrase, is not here present.

At this point, as the Court of Appeals took great pains to indicate, it is most important to note that the outcome of the instant case is exactly the same regard-

less of what law is applied, for both the relevant Federal law and that of New York dictate the same conclusion; if the law of New York (which is considered Procedural, not substantive), is applied, the disputes are unquestionably within the scope of the instant arbitration clause. See *In re Lino Shipbuilding & Engineering Co.*, 6 A.D. 2d 159 (1958); *Application of Potter*, 149 NYS2d 641, aff'd 155 NYS2d 775; *Straight Line Foundry & Machine Corp.* v. *Wojick*, 204 NYS2d 29; *Fabrex Corp.* v. *Winard Sales Co.*, 200 N.Y.S.2d 278. Nor does reference to New York's law of conflicts alter the outcome as New York regards questions relating to the scope of arbitration clauses to be part of the law of remedies and thus *procedural* rather than substantive, such questions being always subject to the lex fori. See *Matter of Gantt*, 297 NY 433, 79 N.E.2d 815 (1948). The same result would obtain even if the law of Florida were consulted as Florida also regards questions of scope to be procedural and subject to the lex fori. See *Pacific Mills* v. *Hillman Garment*, 87 So. 2d 599, Supreme Court of Florida, Division A, 1956. Thus while the applicable law of New York, if applied, would yield the identical results, the *conflicts law* involved regards such questions as procedural and would in any event remit them to the law of the forum, in this case the interpretive procedural law of the Federal Court, acting under the U.S. Arbitration Act.

It is of extreme importance to note at this point that petitioners have dropped their argument with regard to the basic applicability of the U.S. Arbitration Act and now, by their silence, concede that the requisite interstate commerce element is present. The only question left is that of the law which the Federal

Court should apply *under* the Arbitration Act. Assuming arguendo that Petitioners' contentions are correct and that the Court should have considered itself bound by *Erie* v. *Tompkins*, the District Court would simply look, on remand, to New York law for the disposition of the present issues. But the Circuit Court has already held, by Judge Lumbard, that the *reference to arbitration is proper under New York law* as well (See note 3, page 35 of the Appendix to the petition herein). Thus the only possible result on remand to a District court bound by State law under *Erie* would be an exact duplication of the result already reached, i.e., a referal of the subject disputes to arbitration. It may be noted, parenthetically, that inasmuch as Judge Lumbard sat as a Justice of the Supreme Court of the State of New York (1947) and served on a number of occasions as Special assistant attorney general of that State his holding as to the law of New York is to be given the greatest weight and authority. Cf., *Bernhardt* v. *Polygraphic Company of America*, 350 U.S. 198.

Thus there is no conflict with state law at all and no question of the result being different if State rather than Federal law is applied. As previously stated (see *Matter of Grayson-Robinson Stores, Inc.* (supra)) the Court of Appeals of New York was specifically adopted the statement of liberal construction made by the Second Circuit in *Lawrence* so that the two are now as perfectly consistent in form as they were before in substance. Hence it is respectfully submitted that on this issue the instant case is wholly *sui generis* and presents no conflict of principles requiring review by this Court.

POINT TWO

The cases cited by petitioner do not deal with the issues here involved and are completely distinguishable.

Petitioner, in support of its arguments vis-a-vis the doctrine of *Lawrence* v. *Devonshire* cites two cases in an effort to show conflict among the circuits.

But both *American Airlines Inc.* v. *Louisville & Jefferson County Air Board*, 269 F2d 811, and *Ross* v. *20th Century Fox Film Corp.*, 236 F2d 632, involved questions of the *initial validity* of the contracts, the so called "thresh-hold" issue to which we previously referred, and therefore involved questions of the *substantive* law of contracts. These cases may well be in conflict with the holding in *Lawrence* on this issue, but they are in no way in conflict with the holding in the instant case as there is no question here concerning the validity of the subject-contract at all or the choice of laws governing such an issue.

As Petitioners themselves point out (p. 9 of the Petition herein) *Ross* dealt only with the question of whether the contract "presented an enforceable agreement to arbitrate." The issue was thus one involving the substantive law of contracts as applied to the so-called "thresh-hold issue". But when the court in *Ross* finally resolved that question and arrived at the issue of the scope of the arbitration clause no reference at all was made to state law and the Court analyzed the issues on their merits as it saw them.

Similarly, *American Airlines* (supra) involved only the issue of initial validity of the underlying contract and that issue alone. There was no question in *American Airlines* as to the scope of the arbitration clause itself.

Thus while there may or may not be conflict between the cited cases and the holding in Lawrence vis-a-vis the choice of laws on the question of initial validity of the contract, there is no conflict at all with the holding in the instant case on the question of scope for the simple reason that the question did not arise in either of the cited cases and the question with which the two cases *were* in fact concerned does not appear at all in the instant case.

POINT THREE

The holding in the instant case is not in conflict with the holding in *Bernhardt* v. *Polygraphic Company of America*, 350 U.S. 198.

Petitioners have gone to great lengths here, as before, to cloud the actual issues in this case by complex but irrelevant discussions of this Court's decision in *Bernhardt* v. *Polygraphic Company of America*, 350 U.S. 198 (see pgs 12-14 of the Petition herein). In *Bernhardt* the parties were before the Federal bench solely because they were citizens of different states. There was no interstate commerce element present and, most important, the result of the controversy would have been completely different had state rather than Federal law been applied. This Court then held that where there was no interstate commerce element

present, the U.S. Arbitration Act could not apply. The District Court was therefore to regard itself simply as a court of the state in which it was situated and apply that state's laws to the question of whether or not the arbitration contract before it was a valid and enforceable agreement.

None of those elements are present in the instant case.

Instead, we have here a case which involves a contract evidencing a "transction involving interstate commerce" squarely within the meaning and coverage of the U.S. Arbitration Act. There is no question whatever of the validity of the subcontract in the instant case, as there *was* in Bernhardt. The only question here is whether the specific disputes come within the scope of the arbitration clause. Furthermore, the Court of Appeals here found that the result would be the same regardless of whether Federal or New York law, the only two possible choices, is applied.

In *Bernhardt*, this Court's holding was impelled by the stated fear that in a case before the Court solely as a result of diversity of citizenship, the imposition of Federal rather than State law might alter the result in a manner forbidden by the doctrine of *Erie* v. *Tompkins*, 304 U.S. 64. In the words of this Court, in *Bernhardt*,

> "* * * the larger question presented here * * * is whether arbitration touched on substantive rights which Erie R. Co. v. Tompkins held were governed by local law, or was a mere form of procedure within the power of the Federal Courts or Congress to prescribe * * *" (p. 202).

The invasion by Federal law of areas which should be governed by State law is, of course, a legitimate cause for concern. But it is respectfully submitted that where the particular state *itself* regards the particular question or 'field' of law as one of *procedure* rather than substance Federal action is both proper and permissible. (See *Matter of Gantt,* supra). Certainly if the state regards the question as one involving *"procedural"* law it would be odd indeed for the Federal court to insist that the matter is, on the contrary, one of *substantive* law and force the state to apply its own procedural law when under the conflicts law of the state the matter would be left to the lex fori.

Further, where both the State and Federal law would in any event achieve exactly the same result the question becomes academic in the extreme.

As Judge Lumbard stated (Footnote 3 of his concurring opinion, p. 35 of the Appendix to the Petition herein):

> "Even if the contract were not held to be one 'evidencing a transaction involving commerce' the reference to arbitration would still be proper under New York Civil Procedure Act 1450."

It is respectfully submitted that the instant case is wholly *suit generis* and requires no review by this Court.

POINT FOUR

The question of a corporation's principal place of business under 28 USC 1332(c) is one of fact: there is no decisional conflict regarding criteria to be applied whatever.

Petitioners have attempted to create a further issue as to the "tests" to be used to determine a corporation's principal place of business under 28 USC 1332(c). Petitioners cite a number of decisions in different circuits, each dealing with a wholly different type of corporate enterprise, and then attempt to infer that the criteria which petitioners "think" the Court of Appeals used in this case are in conflict with those used by other circuits.

It is respectfully submitted that there is no substance whatever to these allegations and that the introduction of this issue is a last minute attempt to find a question by which to gain the ear of this Court and nothing more. It is spurious in the extreme.

The question of the locus of a corporations principal place of business is one to be decided on the facts and on the facts alone. See e.g., *Clark Brothers Co.* v. *Portex Oil Co.*, 113 F. 2d 45, 47 (9th Cir. 1940); *Townsend* v. *Bucyrus-Erie Co.*, 144 F. 2d 106 (10th Cir., 1944). This was so under Sec. 11 of the Bankruptcy Act after which the present statute was patterned and is no less so today under 28 U.S.C. 1332(c).

Each type of corporate operation is, in a sense, unique. No two corporations, even within the same industry, operate on the same organizational and

structural pattern, and certainly the factual criteria which may determine the principal place of business of a typewriter company (See *Scot Typewriter Co.* v. *Underwood Corp.*, 170 F. Supp 862) are not the same as may determine the issue where a giant steel company (*Moesser* v. *Crucible Steel Co. of America*, 173 F. Supp 953) or a mining concern (*Mattson* v. *Cuyma Ore Co.*, 180 F. Supp 743) are involved.

Rather than pointing to any real conflict in decisions as regards the meaning of Section 1332(c) when applied to a *construction corporation*, Petitioners seem to complain that the court below failed to state any binding criteria at all. This is in fact so. The District Court and the Court of Appeals simply took the facts as presented and, without recourse to any limiting formula which, once established, would only have to be stretched in procrustean fashion with each new case, decided the issue on the basis of the simple facts here present.

The construction industry presents an operational structure unique and different from that of any other form of corporate enterprise. It is respectfully submitted that in each individual case the Court must examine the facts presented by both parties and then determine, on a strictly factual basis within the framework of the particular industry involved just where the principal place of business of the subject corporation is. There can be no universal test applicable to all corporations of whatever kind, as petitioners would seem to contend. Nor for that matter can there be a set of rules and regulations to be applied to some mythical being known as the "construction industry", for different construction companies operate in different fashions.

The holding of the District court, and the affirmance by the Court of Appeals was predicated wholly on the facts, without any reference to "tests" or particular doctrinal criteria. There is no conflict with any decision of any other circuit and there is no requirement that binding ground rules be established. In the instant case the Court simply said: .

> "We find sufficient evidence, however, to support the finding below that petitioners met their burden of establishing that Frouge's principal place of business was Connecticut and not New York. The affidavits filed by the parties established, *inter alia*, that Frouge owned a two-story building in Connecticut; that clerical, bookkeeping and administrative work was done in Connecticut; *and that Frouge's own letterhead referred to the Connecticut building as its 'main office.'* " (Emphasis added)

It is respectfully submitted that on the question of the Principal Place of Business the facts of this case again render it wholly *sui generis* and that there is no conflict of principles requiring review by this Court.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari herein be denied.

Respectfully submitted,

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